recovered from all cost causers and to prevent double recovery of costs.[44] In fact, the FCC has accepted in the expanded interconnection context that all non-recurring costs should be recovered through up front non-recurring charges.[45]

Notwithstanding the long-held recognition that non-recurring costs should be fully recovered through non-recurring charges, AT&T and other CLECs now propose a number of revisions to the Order that would restrict the ability of ILECs to seek reimbursement for network re-engineering and other one-time costs. AT&T argues that ILECs should not be permitted to impose non-recurring charges for modifying networks to make them capable of accommodating multiple exchange service providers, but rather should recover such costs through network element recurring unit prices.[46] AT&T then seeks to drive down the resulting charges by contending that demand for modified elements should be spread across all units of usage, including that of the

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[44] *See, e.g.*, Local Exchange Carrier's Rates, Terms and Conditions in Expanded Interconnection for Special Access, CC Docket No. 93-162, 8 FCC Recd. 6909, 6913, 6916 (Com. Car. Bur. 1993) (Hearing Designation Order); Local Exchange Carrier's Rates, Terms and Conditions in Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97, Phase II, 10 FCC Recd. 11,116, 11,120-22 (Com. Car. Bur. 1995) (Hearing Designation Order).

[45] The only question the FCC believes is relevant is whether the costs justify the rate level and whether there is any double recovery of costs, not whether an upfront charge is appropriate. *See, e.g.*, Local Exchange Carrier's Rates, Terms and Conditions for Expanded Interconnection through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97, Phase 1, 10 FCC Recd. 6375, 6408-09 (1995); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, 102 FCC 2d 1007, 1014 (1985).

[46] AT&T Petition at 11-12.

ILEC.[47] In addition, AT&T urges the Commission to impose rules governing software development,[48] and establish a $5 proxy charge for software improvements.[49] Each of these requests must be denied.

First, allowing the recovery of non-recurring costs only through usage-based rates is bad policy; it places an unfair burden on ILECs and sends incorrect economic signals to purchasers. This issue is particularly important because GTE alone will incur substantially more than $50 million in costs associated with one-time work efforts and investments necessary to meet interconnection, collocation, unbundled network element, and resale requests. There are no guarantees that new entrants will either generate sufficient demand to recoup these costs in a reasonable time frame or rely on GTE facilities long enough to permit GTE fully to recover these costs.[50]

Spreading unit demand for these one-time costs across all units of usage, including that of the ILEC, would only exacerbate the problem. ILEC demand is irrelevant to the issue of implementation cost recovery because such costs would not be incurred absent requests from CLECs. Consequently, taking ILEC demand into

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[47] *Id.* at 12-13.

[48] *Id.* at 16.

[49] *Id.* at 18.

[50] USTA Phase I Reply Comments, Appendix at 8 (Statement of Jerry A. Hausman).

consideration would shift costs caused entirely by new entrants onto the ILEC's ratepayers and/or shareholders.[51] There is no statutory basis for such a result.

AT&T also contends that, when software development costs are necessary to accommodate network unbundling, the cost model should "assume" that ILECs already have the most efficient computer hardware in place -- whether or not it is true and whether or not the ILEC would need that computer hardware upgrade to continue to serve its customers.[52] This is another example of bad economics. As stated previously, the FCC should resist establishing rules based on hypothetical networks and costs in order to keep the price for interconnection and unbundled elements artificially low.[53]

Finally, the Commission should reject AT&T's absurd suggestion that the FCC should presume reasonable a $5 charge for non-recurring work that can be

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[51] *Cf.* Telephone Number Portability, First Report & Order & Further Notice of Proposed Rulemaking, CC Docket No. 95-166 (released July 2, 1996), *petitions for reconsideration pending*. Section 251(e)(2) requires that number portability costs "be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission." Section 252(d)(1), on the other hand, contains no "competitively neutral" language and permits recovery of costs plus a reasonable profit. Obviously there is no profit if ILECs must eat the vast majority of unbundled element modification costs because they have the vast majority of demand associated with the service provided through the underlying facilities. This is not to say that GTE agrees with the pricing mechanism established in the *Number Portability* proceeding; it does not. *See* GTE Comments in CC Docket No. 95-116 (August 16, 1996). Rather, it is only cited to make the point that the statutory standard for pricing unbundled network elements in the manner AT&T suggests is completely out of line with the legal standard for cost recovery of interconnection and unbundled network elements.

[52] AT&T Petition at 16.

[53] *See* Section II.B, *supra*.

accomplished largely through software or electronic means. In support of its argument, AT&T cites an FCC decision that $5 is a reasonable charge for "PIC" changes, i.e., the charge a LEC levies when customers change their presubscribed interexchange carrier (PIC).[54] AT&T neglects to mention that the Commission never found the $5 PIC change rate to be cost-based. Rather, it was a practical decision designed to reflect "some cost recovery" in a proceeding that did not pursue a full investigation of a cost-based PIC change charge.[55] More fundamentally, the decision allowed ILECs to recoup the remaining unrecovered costs through other access rates. Obviously, the $5 PIC change charge has no relevance or merit in the Section 251 context.

For these reasons, GTE urges the Commission to reject AT&T's requests to establish national pricing rules limiting the way in which ILECs recover non-recurring charges. Instead, the Commission should confirm its conclusion in the *First Interconnection Order* that the decision on how to recover non-recurring costs should be left to state commissions.[56]

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[54] AT&T Petition at 18.

[55] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 84-1145, Phase I, FCC 84-188, App. B at 13-5 (released April 27, 1984). The Commission specifically concluded that "A presubscription charge that covers the unbundled costs of a subscription change would be reasonable." *Id. See also* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, FCC 85-69 at ¶ 8 (released February 25, 1985).

[56] *First Interconnection Order* at ¶ 749.

### 3. The costs of operations support systems ("OSS") should not be recovered in other network element prices.

The FCC required ILECs to unbundle their OSS and offer access to those systems as a network element.[57] OSS provide support functions for pre-ordering, ordering, provisioning, repair and maintenance, and billing of ILEC services.[58] AT&T appears to argue that the costs associated with OSS should be recovered through the recurring prices for other unbundled elements.[59] However, recovering OSS costs in the rates for other network elements would violate the statutory requirement that network elements be made available on a stand-alone basis.[60] This approach would also uneconomically recover a portion of OSS direct costs from interconnecting parties who do not use OSS but who purchase other network elements that are burdened with OSS costs.

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[57] *Id.* at ¶¶ 366, 534.

[58] *See* Section 51.319(f)(1) of the Commission's rules, to be codified at 47 C.F.R. § 51.319(f)(1). GTE strenuously objects to the FCC's treatment of OSS as a network element because this function is not part of the network within the meaning of that term in Section 251(c)(3) of the Communications Act. *See* GTE Phase I Comments at 25; GTE Phase I Reply Comments at 23. However, GTE is pressing this argument in its court appeal and, therefore, is not asking the Commission to alter this ruling in this pleading.

[59] AT&T Petition at 29.

[60] 47 U.S.C. § 251(c)(3).

### 4. OSS costs are not included in the FCC's proxy prices.

AT&T also baldly asserts that the costs of OSS are already contained in the proxy prices established by the FCC. This is plainly unfounded. There is no basis in the *First Interconnection Order* for concluding that the costs of order taking and provisioning are included in the FCC's proxy prices for the loop and switching network elements.

In fact, GTE has not yet been able to estimate the future level of costs for OSS access by third parties since such access has never previously been provided. Moreover, the state proceedings from which the FCC derived its proxies did not examine OSS costs at all. Therefore, if the Court ultimately permits the FCC to establish proxies, the Commission must carefully separate out the OSS costs from other network element pricing before setting an OSS proxy price and acknowledge that not all of such costs were included in its proxies.

### 5. The Commission cannot and should not specify a default wholesale discount for each ILEC.

The *First Interconnection Order* established a default proxy range of 17-25% to be used in establishing resale rates offered at wholesale to resellers.[61] These general proxies were not based on individual carrier's costs. Rather, they were at best rough estimates, only meant to be used until actual "avoidable" cost studies were conducted

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[61] *First Interconnection Order* at ¶ 910.

for each carrier. The FCC also provided that the costs contained in specific USOA accounts should presumptively be subtracted in determining "avoidable" costs for computing wholesale discounts on a permanent basis.[62]

MCI proposes to set a separate default discount for each ILEC and to modify the FCC's calculations in deriving these default proxies.[63] Such relief is unauthorized and unwarranted. First, the Eighth Circuit's stay certainly counsels against any exercise of even greater federal control over intrastate rates -- particularly when such action would impose further financial harm on ILECs. Establishing a default rate for each ILEC would be tantamount to the FCC setting rates in violation of Section 252(d)(3), which reserves pricing decisions to the states. As stated previously, Section 252(d)(3) only requires actually avoided costs to be used in establishing the discount.[64] Moreover, even absent the stay, adopting MCI's request for specific ILEC discounts would be a waste of the FCC's time and resources, because many state commissions will have adopted discounts by the time reconsideration is completed. Thus, specifying discount proxies on a carrier-by-carrier basis would be an improper and unwarranted diversion of the Commission's resources.

MCI also argues that the Commission erred when it modified MCI's proposed avoided cost methodology for purposes of calculating the default discount range. MCI contends that the FCC should have calculated indirect expenses by multiplying the ratio

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[62] *Id.* at ¶¶ 917-18.

[63] MCI Petition at 14.

[64] *See* Section II.A.2., *supra.*

of direct avoided costs to total direct costs,[65] rather than using the ratio of direct to total costs.[66] MCI's methodology is again flawed. Indirect expenses by their nature do not vary in direct proportion to the direct costs with which they are associated. For instance, costs for indirect expenses like corporate and federal regulatory will remain the same regardless of whether some direct expenses can be "avoided." MCI, on the other hand, presumes that indirect costs will vary in direct proportion to the amount of direct costs that are "avoided." Although GTE agrees that some indirect expenses will be "avoided" within the meaning of the statute, MCI's proposed methodology is far from an accurate representation of actual avoided indirect expenses. The FCC has no basis, therefore, to adopt MCI's methodology.

MCI next argues that the Commission should exclude from its default avoided cost calculations the data associated with interstate access services because the Commission determined that access services are not "retail services" subject to the resale provision of Section 251(c)(4).[67] This modification has the impact of increasing the ratio used to calculate indirect "avoided" costs by reducing the amount of total direct costs used in the denominator of the calculation formula. The amount of avoided costs would not go down since there are no avoided retail costs associated with access services.[68] MCI's error occurs when it applies the percentage that results from the

[65] MCI Petition at 14.

[66] *First Interconnection Order* at ¶ 929.

[67] MCI Petition at 12-13.

[68] *First Interconnection Order* at ¶ 874.

revised ratio calculation to all retail revenues, which is inconsistent with the method it used to create the percentage, i.e., it used costs in the denominator rather than revenues. When the ratio of indirect expenses is correctly calculated and consistently applied, no difference would result from the exclusion of interstate access costs from the underlying data.

The Commission's default proxy discount range already significantly overstates ILECs' actual avoided costs. It should not compound this error by further increasing the default discounts. For all of these reasons, the FCC should reject MCI's new methodology for computing a default discount for computing wholesale rates for resale.

### 6. Transport and termination rates should include a reasonable profit and should not be artificially capped.

The 1996 Act establishes that reciprocal compensation rates for transport and termination of calls on a carrier's network shall be based on "a reasonable approximation of the additional costs of terminating such calls."[69] As elaborated in the Order, this "additional cost" methodology allows carriers to recover a reasonable allocation of shared costs and a reasonable profit as part of their transport and termination charges.[70] Two petitioners nonetheless have urged the Commission to

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[69] 47 U.S.C. § 252(d)(2)(A)(ii).

[70] *First Interconnection Order* at ¶ 1054.

reverse itself and preclude recovery of a reasonable allocation of shared costs and profit.[71]

These requests have no merit. Shared costs and profit are clearly "additional costs" within the plain meaning of Section 252(d)(2). Any rule or policy precluding the recovery of a portion of common costs associated with transport and termination would violate the 1996 Act and place an unjustified burden on carriers who open their networks to interconnection. Indeed, the Commission has recognized that "a rate equal to incremental costs may not compensate carriers fully for transporting and terminating traffic when common costs are present."[72] The Commission also has acknowledged that some incremental profit is a "cost" that should be recovered from the cost causer.[73] Thus, these petitioners' requests should be rejected.

## III. THE FCC SHOULD NOT FURTHER EXPAND ITS UNBUNDLING REQUIREMENTS

In the *First Interconnection Order* the Commission properly declined to require the unbundling of access to sub-loop elements, dark fiber, and additional AIN capabilities beyond AIN databases and Service Management Systems ("SMSs").[74] Although some petitioners, including AT&T and MCI, urge the Commission to

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[71] National Cable Television Association Petition at 7; Teleport Communications Group ("TCG") Petition at 6-9.

[72] *First Interconnection Order* at ¶ 1058.

[73] *Id.* at ¶ 700.

[74] *Id.* at ¶¶ 390-91, 450, 501-03.

reconsider this decision, none provides new facts or explains why the Commission should revisit the unbundling issue. This Commission should therefore deny these unjustified petitions for reconsideration.[75]

### A. There Is No Basis Generally To Require Sub-Loop Unbundling.

The Commission has already ruled against requests for mandatory unbundling of sub-loop elements. Some petitioners, including AT&T and MCI, now urge the Commission to reconsider this conclusion, asserting that sub-loop unbundling is technically feasible. These claims, however, ignore the well-documented fact that providing access to loop "sub-elements," is technically complex and has never been made generally available in the market. As Bell Atlantic has explained,

> [n]o generally accepted industry standard for loop sub-elements exists today, and special hardware and operational systems would have to be designed, developed and deployed to accomplish such unbundling on a meaningful scale. Moreover, space in existing facilities where access to such loop sub-elements would have to be provided is extremely limited, and provides multiple carriers free ranging access to all these various facilities would raise serious concerns that have to be resolved.[76]

Unbundling the loop into sub-elements is also completely unnecessary for the competitive provision of local exchange service.[77]

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[75] Section 1.106(b)(3) of the Commission's rules permits it to deny petitions for reconsideration based on repetitious arguments.

[76] Bell Atlantic Phase I Comments at 24 (citations omitted).

[77] *Id.* at 23.

Sub-loop unbundling is generally technically infeasible because GTE telephone companies' networks were not designed to permit disaggregated interfaces at different physical points along the subscriber loop. Further, unbundling is complicated because there are a number of different types of feeder/distribution plant deployed in GTEs' networks. As a result, mandated sub-loop unbundling would severely undermine network integrity.[78] GTE is willing, however, to consider requests for further unbundling on a case-by-case basis to determine whether the different types of feeder/distribution facilities can accommodate the request.[79] Moreover, new entrants must evaluate each situation to determine whether the costs associated with sub-loop unbundling make it economical for them to provide service in this manner. However, the Commission should refuse to mandate ubiquitous sub-loop unbundling. Instead, it should reaffirm that state agencies will be allowed to determine on a case-by-case basis whether sub-loop unbundling should be required.[80]

### B. Dark Fiber Is Not A Network Element.

The Commission concluded in the *First Interconnection Order* that the record did not support treating dark fiber as a network element under Sections 251(c)(3) and

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[78] GTE telephone companies also cannot generally handle ordering, provisioning or billing for such sub-loop components.

[79] For example, in California, GTE has agreed to examine on a case-by-case basis whether access to sub-loop elements can be provided. Further, only those geographic areas where feeder/distribution cross-connect boxes exist are eligible. Moreover, GTE will connect the component sub-loop features at the cross-connect box and AT&T has agreed to pay all costs associated with use of sub-loop features.

[80] *First Interconnection Order* at ¶ 259.

251(d)(2).[81] AT&T and MCI now seek reconsideration of this decision, arguing that dark fiber must be provided as a network element.[82] However, neither AT&T nor MCI demonstrates that dark fiber meets the definition of "network element" in Section 3(29) of the Communications Act.

A network element is a "facility or equipment *used* in the provision of a telecommunications service."[83] Dark fiber plainly does not meet the definition of "network element" because it is not *used* in the provision of a telecommunications service. Dark fiber consists merely of strands of glass in the ground, which *may or may not be used* to provide a telecommunications service in the future. If Congress had intended dark fiber to qualify as a "network element," it would have defined "network elements" to include any facility or equipment that *could be used* in the provision of a telecommunications service. It did not do so.

In addition to sound legal reasons, it is good policy to restrict access to GTE's dark fiber. Dark fiber is "spare" equipment, similar to fiber stored on a reel in a warehouse. It has been placed in the ground only because it makes better economic sense to do so from a network planning perspective. Allowing other parties to take advantage of GTE's placement of spare cable disrupts its planning process, thereby

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[81] *Id.* at ¶ 450.

[82] *See* AT&T Petition at 35-37; MCI Petition at 20-23.

[83] 47 U.S.C. § 153(29) (emphasis added).

raising its costs. Taken to its logical conclusion. this argument would treat all spare parts as network elements. This goes far beyond what the statute intended.

Even if the Commission were to conclude that dark fiber should be considered a network element, it should not require ILECs to provide dark fiber to CLECs where ILECs plan to make use of specific plant in the future. The Commission has properly determined that ILECs do not have to build inter-office facilities for CLECS.[84] This holding indirectly accomplishes what the FCC said could not be directly accomplished: if ILECs have to make their reserve facilities available to interconnectors, an ILEC would end up having to construct new facilities anyway to replace those it had been holding in reserve. In fact, an ILEC could never plan ahead by constructing reserve facilities, because it would immediately be forced to offer them to third parties. This would be an illogical and unacceptable result.

### C. CLECs Should Not Have A Right Of Unmediated Access To Advanced Intelligent Network ("AIN") Switch Triggers.

MCI renews its request that third parties be permitted to control ILEC AIN switch triggers from their own service control points ("SCPs").[85] In the *First Interconnection Order*, the Commission properly deferred this issue because it found that such access would raise serious network reliability and security concerns.[86] As

[84] *First Interconnection Order* at ¶ 451.

[85] MCI Petition at 24-28.

[86] *First Interconnection Order* at ¶¶ 501-03.

GTE explained in an *ex parte* filing in CC Docket No. 91-346, unmediated access could lead to electronic conflicts between AIN features that would create major service disruptions, including failure to complete calls to 911.[87] Teleport has also warned that AIN unbundling "makes the ILEC switch vulnerable to inappropriate routing and/or billing instructions from the competitor's SCP, potentially leading to traffic congestion, routing of calls to incorrect trunk groups, or incorrect billing records."[88]

Four major switch manufacturers expressed similar concerns in their comments and reply comments in the *Intelligent Networks* proceeding, explaining that direct access to ILEC AIN switch triggers was not feasible.[89] Moreover, the Information Industry Liaison Committee (IILC) identified twenty two broad technical, operational

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[87] *See* GTE *ex parte*, CC Docket No. 91-346, Technical Background for "Third Party" Access to "AIN Triggers," (April 30, 1996).

[88] TCG Phase I Comments at 37-38.

[89] *See, e.g.,* AT&T Comments to CC Docket No. 91-346 at n.4 ("unlike SMS and SCP access, the mediation and application screening will have to be performed at the switch, which currently does not possess that capability"); Siemens Stromberg-Carlson Comments to CC Docket No. 91-346 at 4 ("a need will exist to define agreeable subsets of AIN capabilities for multiple SCP and/or other external platforms. With switch-based mediation, potentially complex and expensive 'screening' mechanisms will be needed in OSSs that require access to switches for 'trigger administration.'"); *id.* at 15 ("it needs to be recognized that such a 'mediated access' function could easily take more processing resources in the switch to protect the network than it does to actually perform the requested function"); Northern Telecom Inc. Reply Comments to CC Docket No. 91-346 at 3 (". . . Northern Telecom believes that opening AIN interfaces on the switch must be approached very carefully in the face of paramount network integrity objectives . . . [and further] believes that much more practical experience must be gained in order to concurrently meet both 'open network architecture' objectives for AIN switch interfaces and network integrity objectives.").

standards and mediation issues that need to be resolved before widespread logical interconnection can be made to ILEC AIN switch triggers.[90]

These conclusions are consistent with the AT&T-BellSouth AIN test report which AT&T and Bellsouth filed with the FCC.[91] The Joint Report indicates that both parties identified the need to conduct additional testing in the following areas: "feature interaction, error handling, network management, [and] multi-service provider environment."[92] The test results lead to the inescapable conclusion that technical feasibility of the tested interconnection arrangement, like direct access to AIN switch triggers generally, cannot be supported at this time.

Unbundled access to AIN elements cannot be accomplished until appropriate mediation techniques and feature interaction management issues have been satisfactorily addressed and resolved. Until then, the integrity and reliability of the nation's telecommunications network could be compromised if unmediated access to AIN switch triggers were mandated. The Commission accordingly should deny MCI's request.

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[90] A Report of the Information Industry Liaison Committee (IILC): IILC Issue 026 - Long Term Unbundling and Network Evolution (April 19, 1995).

[91] AT&T & BellSouth, AT&T-BellSouth AIN Test Report (Laboratory to Laboratory AIN Interconnect Test) (November 1995). The Joint Report contains both joint and individual findings from laboratory experiments undertaken by these parties to test interconnection of an AT&T laboratory SCP with laboratory Bell South SSPs using a single prototype AIN service application.

[92] *Id.* at 19.

## IV. REMOTE SWITCHING MODULES ARE NOT ENTITLED TO BE COLLOCATED AT ILEC CENTRAL OFFICES.

The Commission concluded that ILECs need not permit collocation of switching equipment "since it does not appear that it is used for actual interconnection or access to unbundled network elements."[93] AT&T and MFS ask the Commission to rule that CLECs should be permitted to collocate remote switch modules, claiming that such equipment does not raise the same space concerns as regular switches.[94]

The bar on switching equipment is based on the language of Section 251(c)(6), which requires collocation only of equipment "necessary for interconnection or access to unbundled element."[95] Prior to passage of the 1996 Act, the Court of Appeals for the D.C. Circuit determined that the Commission did not have authority to require physical collocation.[96] The Commission's authority to mandate collocation therefore is governed solely by Section 251(c)(6). Because the equipment identified by AT&T and MFS is not used for purposes recognized under that section -- interconnection or access to unbundled elements -- the Commission cannot mandate its collocation.

What is more, remote switching modules actually use space much less efficiently than does transmission equipment. The modules require multiple equipment bays for different components of the modules and take up to eight times the amount of

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[93] *First Interconnection Order* at ¶ 581.

[94] AT&T Petition at 31-34; MFS Petition at 11-14.

[95] *See* 47 U.S.C. § 251(c)(6).

[96] Bell Atlantic Telephone Companies v. F.C.C., 24 F.3d 1441 (D.C. Cir. 1994).

floor space of corresponding digital loop carrier equipment. Petitioners' arguments are consequently incorrect that remote switching modules can be easily accommodated at LEC central offices. Therefore, the requests should be denied.

## V. THERE IS NO BASIS FOR IMPOSING FURTHER FEDERAL CONTROL OVER THE TERMS AND CONDITIONS OF RESALE

### A. The Commission Should Not Mandate Resale Of All Short-Term Promotions.

In the *First Interconnection Order* the Commission concluded that promotional rates lasting less than 90 days are not truly "retail rates" subject to the Section 251(c)(4) wholesale rate obligation.[97] AT&T and MCI now insist that the 1996 Act mandates extension of Section 251(c)(4) to any offering of any duration.[98] The petitioners, however, offer no reasons for the Commission to reconsider its decision.

The Commission's interpretation is entirely consistent with the broad pro-competitive policies underlying the 1996 Act and its express statutory language. As the Commission concluded, "promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales-based competition."[99] Moreover, Section 251(c)(4) prohibits only *unreasonable* limitations on resale. The

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[97] *First Interconnection Order* at ¶ 949.

[98] AT&T Petition at 29-31; MCI Petition at 8-12.

[99] *First Interconnection Order* at ¶ 949.

beneficial consumer impact of short-term promotions easily satisfies any test of reasonableness.

The Commission should also reject MCI's proposal that the FCC adopt an array of additional requirements that would place serious restrictions on an ILEC's ability to offer marketing promotions. The *First Interconnection Order* already prevents an ILEC's use of promotional offerings to evade the wholesale rate obligation by limiting such offerings to a maximum duration of 90 days, and forbidding ILECs from offering multiple, consecutive 90-day promotions.[100] Moreover, state commissions have adequate incentives and abilities to ensure that a promotional offering is not used to evade the resale obligation. Therefore, additional limitations are unnecessary and the Commission should deny these petitions for reconsideration.

### B. The FCC Should Not Further Limit The Use Of Reasonable Geographic And Premises Restrictions Contained In Retail Offers.

The *First Interconnection Order* established a rebuttable presumption that limitations on resale, other than those identified in the rules, are unreasonable.[101] The Order permits ILECs to overcome this presumption, however, by demonstrating to

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[100] Section 51.613(a)(2) of the Commission's rules to be codified at 47 C.F.R. § 51.613(a)(2).

[101] *First Interconnection Order* at ¶ 939. The FCC found that the following restrictions on resale were reasonable: class of customer, short term promotions, and failure to unbrand or rebrand in certain circumstances. *See* Section 51.613 of the rules, to be codified at 47 C.F.R. § 51.613.

state PUCs that such limitations are in fact reasonable and legitimate.[102] MFS now urges the Commission to declare that any tariff limitation for a retail service that has the effect of limiting resale will be presumed unreasonable.[103]

Assuming *arguendo* that the Commission has jurisdiction to adopt such a presumption, a national presumption against local tariff provisions that adversely affect resellers is too vague to be of practical use to state commissions. The justification for such a prohibition also violates the maxim that a carrier need not design its retail offerings with resellers in mind. Rather, resellers must take the tariff that the ILEC offers.[104] Accordingly, the Commission should deny MFS's petition.

### C. The Requested Limitations On The Rights Of ILECs To Withdraw Services Should Be Summarily Rejected.

In the *First Interconnection Order*, the Commission concluded that state commissions are better suited than the FCC to assess the particular implications raised when a LEC withdraws a service.[105] The Order further concludes that a LEC may "grandfather" a withdrawn service if it also allows that service to be resold to the existing subscriber base.[106] MCI now asks the Commission to adopt national rules

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[102] *Id.*

[103] MFS Communications Petition at 22.

[104] *First Interconnection Order* at ¶ 877.

[105] *Id.* at ¶ 968.

[106] *Id.*

permitting withdrawal only if the LEC can prove zero demand for the service at retail or wholesale prices.[107] This request must be denied.

As a threshold matter, MCI assumes that the Commission can remove all discretion from the states. In fact, a state would be prohibited in most cases from even considering whether a LEC has a legitimate reason for withdrawing a service. Obviously, this outcome is of questionable legality.

Even if the Commission had jurisdiction to remove all discretion from the states in this area, the *First Interconnection Order* documents sound policy reasons for affording ILECs flexibility. In a competitive marketplace, carriers must be able to withdraw services to meet legitimate business exigencies, and they must have the flexibility to respond to the increasing pressure competition will place on traditional rate relationships and service offerings. States have a variety of laws governing service withdrawal, and they are in the best position to assess whether withdrawal complies with those laws.[108] Therefore, the FCC should deny MCI's petition for reconsideration.

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[107] MCI Petition at 7-8.

[108] *First Interconnection Order* at ¶ 968.

## VI. THE COMMISSION'S RULES PERTAINING TO RIGHTS OF WAY ARE INCONSISTENT WITH THE 1996 ACT AND CONGRESSIONAL INTENT

Certain electric utilities[109] have petitioned the Commission to reconsider its rules governing the rates, terms and conditions for access to poles, ducts, conduits and rights-of-way. GTE concurs with these companies that the Commission has departed from both the plain language of Section 224 and congressional intent that seeks to establish a pro-competitive, deregulatory framework within which parties can voluntarily negotiate contractual agreements. Therefore, GTE respectfully urges the Commission to grant these petitions for reconsideration and clarification.

### A. By Requiring Uniform Rates, Terms And Conditions For Access, The Commission Has Made Voluntary Negotiation Under Section 224(e)(1) Impossible.

The Commission decided in the *First Interconnection Order* that the rates, terms and conditions of access to distribution structures and rights-of-way must be *uniformly* applied to all telecommunications carriers.[110] The petitions filed by the Florida Power & Light Company and the American Electric Power Service Corporation urge the FCC to reverse this ruling.

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[109] These companies are the American Electric Power Service Corporation, the Consolidated Edison Company of New York, Inc., the Delmarva Power & Light Company, the Duquesne Light Company, the Edison Electric Institute, and the Florida Power & Light Company.

[110] *First Interconnection Order* at ¶ 1156.

The FCC's uniformity requirement directly conflicts with Section 224(e)(1) of the 1996 Act, which allows utilities and telecommunications carriers the opportunity to negotiate and enter into a binding contractual agreement about the rates, terms and conditions of access.[111] The conflict between the Commission's decision and Section 224(e)(1) is clear: voluntary negotiations between utilities and other carriers are unnecessary if rates, terms and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access. In addition to conflicting with the express language of Section 224(e)(1) itself, the Commission's decision is inconsistent with the legislative history and congressional intent behind Section 224 and the 1996 Act as a whole. The Conference Committee's report explains that new subsection (e)(1) was added "*to allow parties to negotiate* the rates, terms, and conditions for attaching to poles, ducts, conduits, and rights-of-way owned or controlled by utilities. . . ."[112]

Negotiated agreements are an essential component of the policy underlying the 1996 Act "to provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition."[113] Requiring uniform rates, terms and conditions for access is inconsistent with the concept of a

[111] 47 U.S.C. § 224(e)(1). Specifically, this section states that the Commission will prescribe regulations "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, *when the parties fail to resolve a dispute over such charges.*" *Id.* (emphasis added).

[112] Conf. Rep. at 207 (emphasis added).

[113] *Id.* at 113.

deregulatory policy framework designed to encourage competition. Therefore, GTE supports the petitioners' request that the Commission correct this clear error by adopting regulations that enable parties voluntarily to negotiate the rates, terms and conditions of access.

### B. The Communications Act Mandates Access Only To Poles, Ducts, Conduits And Rights-Of-Way.

Section 224(f)(1) states specifically that a "utility carrier shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any *pole, duct, conduit, or right-of-way* owned or controlled by it."[114] The *First Interconnection Order* seems to require access to a greater number of facilities than the four delineated by Section 224(f)(1).[115] The petitions filed by Consolidated Edison Company of New York, Inc., and the Florida Light and Power Company ask the Commission to clarify that pole owners are obligated to provide access only to poles, ducts, conduits and rights-of-way. They request that the Commission clarify that Section 224 does not allow telecommunications carriers access to utility transmission towers, generation station, pathways, utility meters, or buildings.

"Transmission facilities" is a term that encompasses equipment, plant and structures used to provide transmission of telecommunications. The statute, on the

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[114] 47 U.S.C. § 224.

[115] The *First Interconnection Order* states that "[w]e believe that the breadth of the language contained in section 224(f)(1) precludes us from making a blanket determination that Congress did not intend to include transmission facilities." *First Interconnection Order* at ¶ 1184.

other hand, only addresses a limited subset of such structures used to house transmission wires and associated legal rights-of-way. Requiring access to anything other than poles, ducts, conduits and rights-of-way contradicts the plain language and meaning of Section 224. Therefore, GTE asks the Commission to clarify that Section 224 does not require utilities to provide telecommunications carriers access to all transmission facilities.

### C. The Commission Should Clarify Its Cost Sharing Rules With Respect To Modifications To Facilities Caused By Government Agencies.

In its *First Interconnection Order* the Commission explained that only those parties that "initiate" a modification or for whose "specific benefit" a modification is made will be required to share in the cost of such modification.[116] However, the Commission does not address how costs should be allocated when a governmental agency initiates the modification. The petition filed by the Duquesne Light Company requests the FCC to clarify that if pole relocation is caused by a government agency, such as when a road is widened and distribution poles along the road need to be relocated, the utility and all attaching entities must share equally in the cost of accomplishing the modification. This sharing would be computed based on the ratio of useable space occupied by each, and each attaching party must pay the entire cost of moving its own attachments from the old pole to the new pole.

[116] *First Interconnection Order* at ¶ 1211-13.